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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 943.

EDWARD LAMB,
Petitioner,
vs.
PAT SUTTON and WSM, INC.,
Respondents.

EDWARD LAMB,
Petitioner,
vs.
PAT SUTTON and WLAC, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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INDEX.

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement of the case	3
Argument	6
I. There is no conflict of decisions	6
II. There is no important or undetermined federal question	11
III. There is a concurrence of findings	14
IV. The decision is clearly correct	15

Cases Cited.

Allen v. Trust Co. of Georgia, 326 U. S. 630, 636, 66 S. Ct. 389, 90 L. Ed. 367 15

Anderson v. Abbott, 321 U. S. 349, 356, 64 S. Ct. 531, 88 L. Ed. 793 15

Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U. S. 525, 79 S. Ct. 1302, 3 L. Ed. (2d) 1407 ..... 7, 8, 11, 12, 13, 16

Faulkner v. Gibbs, 338 U. S. 267, 70 S. Ct. 25, 94 L. Ed. 62 15

Fernandez v. United Fruit Company, 200 F. (2d) 414 ..... 8, 11

General Talking P. Corp. v. Western Electric Co., 304 U. S. 175, 178, 58 S. Ct. 849, 82 L. Ed. 1273 15

Lamb v. Sutton, 164 F. Supp. 928, at 935 ..... 8, 12, 14

Lamb v. Sutton, 274 F. (2d) 705 ..... 13, 15

Mazer v. Stein, 347 U. S. 201, 74 S. Ct. 460, 98 L. Ed. 630 12

National Licorice Company v. National Labor Relations Board, 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799 12

Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 14

Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413 15

United States v. Johnston, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 14

United States v. O'Donnell, 303 U. S. 501, 508, 58 S. Ct. 708, 82 L. Ed. 980 15

Weiss v. Los Angeles Broadcasting Company, Inc., 163 F. (2d) 313 6

Statute Cited.

Federal Communications Act of 1934, Section 315 ..... 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15

Rule Cited.

Rule 23 (c) 12

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OPINIONS BELOW.

The Opinion of the United States District Court for the Middle District of Tennessee in this case has been reported at 164 F. Supp. 928. The Opinion of the United States Court of Appeals for the Sixth Circuit has been reported at 274 F. (2d) 705. Both Opinions are printed in the Appendix to the Petition and otherwise appear in the certified record.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

We do not agree that the questions presented for review by the Petition emerge from the record in this case, and we submit as the only question to be decided the following:

Shall the Supreme Court grant certiorari in order to review the concurrent findings of two courts below that the respondents, licensees under the Federal Communications Act of 1934, properly raised the defense of immunity under Section 315 of said Act, and established the necessary facts to support such defense?

STATEMENT OF THE CASE.

A comparison of the statement of the case by petitioner with the statement thereof by the courts below in their respective opinions will disclose that the case stated by petitioner is not the case stated and decided by the courts below. Because of the inaccuracies, omissions and irrelevancies in petitioner's statement of facts, we believe it is necessary to make a new statement as follows:

Petitioner sued Pat Sutton and WSM, Inc., for libel. His complaint averred that the defamations were uttered by Sutton, a member of Congress, at a time when he was an announced candidate for the Democratic nomination for the office of United States Senator and when his opponent in the Primary was Senator Estes Kefauver (App., 6a), and that the defamations were broadcast over the radio and television facilities of respondent WSM, Inc., by the use of time purchased by Sutton (App., 7a, 9a). A similar suit was brought by petitioner against Pat Sutton and respondent WLAC, Inc., which then owned and operated a radio station but not a television station (App., 12a-20a). Both respondents (WSM, Inc., and WLAC, Inc.) admitted in their answers that Pat Sutton was a candidate for the office of United States Senator when he made the utterances complained of and that his opponent was Senator Estes Kefauver (App., 22a, 26a). In their answers the respondents also raised the defense provided in Section 315 of the Federal Communications Act by stating in substance the facts on which they relied and claiming thereby the immunity provided under the Federal law (App., 22a-23a, 30a). The defense of Pat Sutton, the candidate who uttered the alleged defamations, was that they were true and he was justified in saying them (App., 36a).

At a pretrial conference, respondents again asserted the defense of immunity under Section 315 (App., 34a, 37a and

Tr. of Proceedings at Pretrial Conference made a part of the record by order of the Court of Appeals under date of February 10, 1960). At such conference the parties enumerated the issues of fact to be tried by the jury and the issues of law to be determined by the Court (App., 36a). No party suggested there was any issue of fact as to the qualifications of Pat Sutton and Estes Kefauver and there was no such issue of fact specified (App., 36a and Tr. of Proceedings at Pretrial Conference). Among the issues of law to be determined by the Court were these:

> "1. The meaning and applicability of Section 315, Title 47, U. S. C. A.
>
> 2. The constitutionality of Section 315, Title 47, U. S. C. A. in the event it were to be applied as contended by corporate defendants" (App., 37a).

The cases were tried jointly over the objection of petitioner, and subsequently were consolidated in order that one record could serve for both on appeal (App., 76a). In the opening statements to the jury, respondents stated and explained their defense of immunity under Section 315 (App., 94a-95a), and in advance of the hearing filed trial briefs with the Court with respect to the matter (App., 40a, 90a).

The issues of fact as to the truth of the defamatory statements and as to Sutton's justification for making them resulted in a protracted trial lasting three weeks, and with a record of more than 1500 pages (App., 39b, 40b). The evidence as to these matters is no longer relevant and need not be stated. The testimony established that Pat Sutton was a legally qualified candidate (App., 73a, 132-133a, 3b, 6b, 8b-11b, 16b, 33b-35b).

The testimony also established that Estes Kefauver, Sutton's opponent, was a legally qualified candidate (App., 7a, 22a, 73a, Ex. 1, 6b, 8b-11b, 16b, 33b-35b).

The evidence showed that Sutton in furtherance of his campaign for United States Senator conducted a so-called "Talkathon" which was carried over the radio and television facilities of respondents and that the defamatory statements complained of were made by him in the course of the Talkathon (App., 5a-6a, 15a-16a); that prior to this time Senator Kefauver had used the facilities of both respondents for political broadcasts in connection with his current campaign and had previously contracted for their use on a date subsequent to the Talkathon (App., 150a, 13b, 20b, 36b). There was no conflicting evidence with respect to any of the facts enumerated in this paragraph. No one ever questioned that Pat Sutton and Estes Kefauver were qualified candidates and everybody knew they qualified as candidates (App., 158a).

At the conclusion of all the evidence, both respondents made motions for directed verdicts, each on the ground that "by reason of Section 315 of the Federal Communications Act of 1934, it has a privilege or immunity from suit for defamation based upon material broadcast by a legally qualified candidate for public office who was granted time by the licensee after his opponent had been granted time" (App., 57a). The Court announced that without indicating an opinion on the merits of the motions they would be overruled and could be renewed if necessary after verdicts (App., 39b-40b). Following verdicts for the plaintiff against Pat Sutton and both respondents, the respondents moved the Court to set aside the verdicts and to enter a judgment in their favor in accordance with their motions for directed verdicts made at the conclusion of the evidence (App., 58a-59a). These motions were sustained (App., 84a, 86a) and a carefully prepared opinion was filed (App., 61a). Petitioner's appeal followed. The individual defendant Pat Sutton, against whom verdict and judgment were rendered, did not appeal.

ARGUMENT.

I.

There Is No Conflict of Decisions.

(a) In the present case the courts below held that where broadcasting stations sold time to Senator Kefauver, a legally qualified candidate, and thereafter sold time to Congressman Pat Sutton, his opponent, also a legally qualified candidate, such licensees are forbidden by Section 315 of the Federal Communications Act to remove defamatory statements from material broadcast by Sutton and are not liable for defamations uttered by him speaking as a candidate in his own behalf. In an effort to obtain certiorari from this Court to review this case, petitioner asserts that its holding is in conflict with the decision of the Ninth Circuit, in **Weiss v. Los Angeles Broadcasting Company, Inc.**, 163 F. (2d) 313.

There is no such conflict as petitioner claims. The present case is an action by a defamed person against broadcasting stations for statements which a legally qualified candidate made over the stations after previous use by his opponent, also a legally qualified candidate. The Weiss case was a suit by a legally qualified candidate against a broadcasting station for censoring his utterances when none of his opponents had used the facilities of the station. In the Weiss case an individual sued a licensee for breach of its alleged duty under Section 315. In the present case a licensee being sued for defamation relied upon its immunity under Section 315. In the Weiss case only the plaintiff, among opposing candidates, had ever used the broadcasting facilities of the licensee. In the present case both legally qualified candidates used the facilities of the licensee and it was the statements of the second user which were allegedly defamatory of a third party, the plaintiff. Thus

the two cases are entirely different and decisions in favor of both defendants (licensees) are not in conflict with each other.

In thus distinguishing the cases we do not indicate agreement with the Weiss case in its implication that a licensee has power to censor material broadcast by a legally qualified candidate so long as the licensee has sold no time to his opponent and that the no-censorship provision of Section 315 applies only when a licensee affords equal opportunity to one candidate to answer his opponent who has previously broadcast.

The language of the Act does not support such interpretation. It forbids censoring of "material broadcast under the provisions of this Section." All material broadcast by legally qualified candidates is broadcast under its provisions, as is demonstrated by the fact that Section 315 enumerates the charges which may be made therefor.

A broadcasting station is forbidden to bar libelous statements of legally qualified candidates, whether the uttering candidate was a second user or was the first candidate in that political contest to speak over that station, or even whether at the time of the utterance he was the only qualified candidate. The freedom of a candidate from censorship does not depend upon the status of his opponent. The candidate's right to demand time from a licensee depends upon whether time has been granted his opponent, but his freedom from censorship is not so limited. Such we understand to be the true meaning of Section 315 and the unanimous holding of this Court in both opinions in the case of **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, 360 U. S. 525, 79 S. Ct. 1302, 3 L. Ed. (2d) 1407.

The immunity in Section 315 is obviously no less broad than its restriction upon censorship. Where the station cannot censor a reply broadcast by a candidate, it is im-

mune from liability for defamation which he utters. Where the station cannot censor a broadcast by the first candidate to use its facilities, there is the same immunity. Thus respondents doubt that the Weiss case is right in its implication that the no-censorship provision applies only where an opposing candidate has used the facilities, and the District Judge expressed the same doubt. **Lamb v. Sutton**, 164 F. Supp. 928, at 935. However, even if the Weiss case is right as to when the no-censorship provision applies with its consequent immunity, then the case at bar factually meets its requirement because respondents had sold time to Senator Kefauver before they sold the time to Pat Sutton for the occasion on which he uttered the defamations.

Finally, if it be assumed that there is a conflict between the Weiss case and the case at bar, then there is the same conflict between the Weiss case, decided in 1947, and the case of **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, decided by this Court in June, 1959. In such situation, the Weiss case has lost all vitality and been discredited in this connection and there would exist no conflict of decisions to justify the granting of certiorari. As further demonstration that there is no conflict, respondents point out that the Weiss case was not even cited in the opinions of this Court in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra.

(b) In another effort to find a conflict of decisions as the basis for certiorari, petitioner asserts a conflict between the holding of the Sixth Circuit in this case and the decision of the Second Circuit in **Fernandez v. United Fruit Company**, 200 F. (2d) 414, wherein it was held that the District Court did not commit error in limiting the consideration of the issues at the trial to those issues enumerated by pretrial order.

The asserted conflict is imaginary and non-existent. Petitioner's claim of conflict is that in the Fernandez case the Second Circuit affirmed a District Court, which in the trial of the case had limited a party to the issues enumerated in the pretrial order, while in the case at bar (according to the claim) the Sixth Circuit affirmed the District Court, which in the trial of the case permitted a party to rely upon an issue not enumerated in the pretrial order. Even if petitioner's premises were true and the Sixth Circuit had done that which petitioner claims, there would still not be a conflict of the decisions. The fact that a trial court did not commit reversible error when it held a party to a pretrial order does not establish that another trial court in a different case and under other circumstances committed reversible error in permitting a departure from the pretrial order.

The real answer to petitioner's contention and the one given by the Sixth Circuit (the contention not having been made in the trial court) is more basic. **Petitioner's premises are false because respondents did not go beyond the pretrial order in any respect.**

At the pretrial conference respondents explained to the Trial Court their defense under Section 315 and said "that the law which forbids the station to censor by implication grants a privilege against liability for damages resulting from the liability of the candidate". It was further explained that the candidate remains liable for his own defamations but the station, which has no power to censor, cannot be held liable for damages and "that Congress exercised its power and occupied the field" (Proceedings at Pretrial Conference made part of the record by order of Court of Appeals under date of February 10, 1960). This defense, explained to the Trial Court at the pretrial conference, was the same defense which had been advanced in the answers (App., 21a, 25a; Appendix to Petition, 47-48).

In the pretrial conference, petitioner denied that respondents had correctly interpreted Section 315 or that the statute granted the claimed immunity. In view of these conflicting positions the Pretrial Order provided that among "the issues of law to be determined by the Court" were "the meaning and applicability of Section 315" and its constitutionality "in the event it were to be applied as contended" by respondents (App., 37a). The meaning, the applicability and the constitutionality of Section 315 could not be issues of law unless the necessary facts to bring the statute into operation were admitted or capable of being proved. It appeared to respondents at the pretrial conference that these facts were admitted because petitioner did not ask that they be enumerated as issues of fact after respondents had specifically given their interpretation of Section 315 and relied upon it.

There was very real reason for respondents' belief. The whole case from beginning to end was tried only upon the theory that Congressman Pat Sutton was a candidate against Senator Estes Kefauver, and, in furtherance of his candidacy, Sutton broadcast certain allegedly defamatory statements. Both complaints alleged that Pat Sutton was an announced candidate who uttered the defamatory statements during the campaign and that Senator Kefauver was his opponent. These allegations had been admitted by the answers and the immunity of Section 315 invoked. Everybody knew Kefauver and Sutton qualified as candidates, that both names appeared upon the ballot, that Kefauver won and Sutton lost, and no one ever questioned their qualifications (App., 158a).

Petitioner's contention is that under the Pretrial Order, as construed by petitioner, the respondents were prevented from proving that Kefauver and Sutton were legally qualified candidates and were thus prevented from having the trial court consider and sustain a motion for directed ver-

dict based upon Section 315. Both courts below refused to give the Pretrial Order such an amazing and unfair interpretation. For the trial court to have held it could not decide an issue of law reserved for its decision by the Pretrial Order because such order did not make the facts with respect to the matter an issue for the jury would have been far fetched indeed and would have entirely ignored specific provisions of such order.

Thus petitioner's argument that the holding in the case at bar conflicts with the holding in **Fernandez v. United Fruit Company**, supra, is based upon the erroneous premise that in the present case there was a pretrial order which waived or abandoned the defense that Section 315 granted immunity, which defense had been asserted in the answers and restated at the pretrial conference. In an effort to make this contention have some plausibility, petitioner carefully discusses it without bringing to the attention of this Court the only provisions of the Pretrial Order relevant to his contention, these being the portions which enumerated the issues of law to be determined by the Court, including the meaning and applicability of Section 315 and its constitutionality if construed as contended by respondents.

II.

There Is No Important or Undetermined Federal Question.

In **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, this Court held that "Section 315 of the Federal Communications Act of 1934 bars broadcasting stations from removing defamatory statements contained in speeches broadcast by legally qualified candidates for public office" and "grants the station a Federal immunity from liability for libelous statements so broadcast". Such holding definitely and

authoritatively settled the only substantial Federal question in petitioner's case.

Petitioner in the present case does not raise any question as to the soundness of the holding in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, nor ask that such decision be overruled, departed from or qualified. These questions are, therefore, not presented for review. Rule 23 (c); **National Licorice Company v. National Labor Relations Board**, 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799; **Mazer v. Stein**, 347 U. S. 201, 74 S. Ct. 460, 98 L. Ed. 630.

In the present case, the Opinion of the District Court held that by Section 315 the respondents were denied the right to censor material broadcast by legally qualified candidates and by necessary implication were granted immunity from liability therefor (App., 61a, **Lamb v. Sutton**, 164 F. Supp. 928). This Court in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, recognized that such was the holding of the District Court in the case at bar and cited **Lamb v. Sutton** to that effect in Footnotes 3, 8 and 14 of the majority opinion.

When the case at bar was tried, decided and appeal taken, this Court had not decided **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, nor even granted certiorari in that case. There was in prospect on the appeal of the case at bar the presentation of an important question of Federal law not previously answered by this Court, nor even by any United States Court of Appeals. Then came the decision of this Court in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, so that even prior to the argument of the present case in the Court of Appeals for the Sixth Circuit there had ceased to be present in the case any substantial or undetermined Federal question. The opinion of the Sixth Circuit recognized this to be the situation

[**Lamb v. Sutton**, 274 F. (2d) 705]. The only Federal question of substance had been resolved adverse to petitioner by the opinion of this Court on June 29, 1959 in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra.

Whether respondents raised the question of their claimed immunity under Section 315 by pleadings which petitioner (but not the two lower courts) regards as inadequate is not an important Federal question. Whether Congressman Pat Sutton, a defeated candidate for United States Senator in 1954, was then a legally qualified candidate, and whether Senator Estes Kefauver, a successful candidate for United States Senator in 1954, was then a legally qualified candidate are not important Federal questions. Whether these facts were proven by clear, convincing and uncontradicted evidence, as the two lower courts held, is not an important Federal question. Yet these are the contentions to resolve which petitioner asks this Court to grant certiorari.

Whether the trial court, by directing a verdict for respondents, deprived petitioner of his constitutional right to trial by jury could be a substantial question under a different record. However, in this case the record shows: (1) petitioner, aware of respondents claim of immunity under Section 315, did not at the pretrial conference make the legal qualifications of either candidate an issue of fact triable by jury; (2) the fact of qualification by both candidates is clearly established in the record, as appears from the Statement of the Case, hereinabove, pp. 3-5; (3) in the petition no effort is made to point to any contradictory evidence, this for the reason that there is not a scintilla or even suspicion of such evidence; and (5) petitioner's contention in this respect is an afterthought, advanced for the first time in this Court, as appears from the opinions below.

Petitioner proceeds upon the erroneous assumption that this Court grants certiorari to review evidence and discuss

specific facts, but the practice is otherwise. **United States v. Johnston**, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925. Petitioner proceeds upon the further erroneous assumption that this Court sits for the benefit of particular litigants, but this Court has held to the contrary. **Rice v. Sioux City Memorial Park Cemetery**, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897.

III.

There Is a Concurrence of Findings.

Petitioner asks this Court to grant certiorari in order to search the record and conclude that there is no evidence Congressman Pat Sutton was a legally qualified candidate for United States Senator in 1954 and also that there is no evidence Senator Estes Kefauver was a legally qualified candidate in 1954, when he was renominated and reelected. Respondents will not discuss the evidence in this regard, because in the next and final section of this Argument, it will be shown that the decision is clearly correct, and, *a fortiori*, there was evidence to support it. In this respect there are concurrent findings of the two courts below:

The District Court held that it clearly appeared from the record both candidates were legally qualified at the time of the broadcast (App., 61a, 73a; **Lamb v. Sutton**, 164 F. Supp. 928, at 935). This finding is to be contrasted with the erroneous assertion of the petition, page 19, based upon a selected excerpt from a colloquy during argument that "the district court was completely convinced" neither candidate was legally qualified.

The Court of Appeals held:

> "The District Judge in a well-reasoned opinion . . . discussed and answered other contentions of the appellant, including the alleged deficiency of proof on the part of the appellees. We agree with his rulings

with respect thereto" [Appendix to Petition, p. 48; **Lamb v. Sutton**, 274 F. (2d) 705 at 707].

This Court has held that granting the writ of certiorari is not warranted merely to review the evidence or inferences drawn from it. **General Talking P. Corp. v. Western Electric Co.**, 304 U. S. 175, 178, 58 S. Ct. 849, 82 L. Ed. 1273; **Southern Power Co. v. North Carolina Pub. Serv. Co.**, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413. The Court has many times emphasized the weight to be given concurrent findings of two lower courts, holding that they are not to be disturbed unless clear error is shown. **Faulkner v. Gibbs**, 338 U. S. 267, 70 S. Ct. 25, 94 L. Ed. 62; **Anderson v. Abbott**, 321 U. S. 349, 356, 64 S. Ct. 531, 88 L. Ed. 793. In other cases the Court has said that findings which are concurrent findings of two lower courts will be accepted by it without re-examination of the evidence. **Allen v. Trust Co. of Georgia**, 326 U. S. 630, 636, 66 S. Ct. 389, 90 L. Ed. 367; **United States v. O'Donnell**, 303 U. S. 501, 508, 58 S. Ct. 708, 82 L. Ed. 980.

IV.

The Decision Is Clearly Correct.

Pat Sutton, a legally qualified candidate for United States Senator, purchased the use of the broadcasting facilities of respondents in furtherance of his candidacy. Prior to the time of the purchase such facilities had been used by his opponent, Senator Estes Kefauver, and the latter had also contracted for their use on a date subsequent to the broadcast-telecast by candidate Sutton. Petitioner sued respondents and Sutton for defamatory statements made by Sutton in furtherance of his candidacy and broadcast over respondents' facilities.

The defense of respondents was that by Section 315 of the Federal Communications Act they were denied the power to censor the statements of candidate Sutton and

were granted immunity against liability for such utterances. This defense was asserted in the answers, reiterated at the pretrial conference, discussed in pretrial briefs, outlined in the opening statement at the trial, relied upon in motions for directed verdicts and again relied upon in motions to set aside verdicts. Such defense was sustained by the trial court. Subsequent to the decision of this Court in **Farmers Educational and Cooperative Union of America v. WDAY, Inc.**, supra, the decision in the present case was affirmed by the Sixth Circuit.

The facts stated were established by evidence, as the two courts below have concurred in finding. Thus the decision below is clearly correct unless the decision of this Court in **Farmers Educational and Cooperative Union v. WDAY, Inc.**, supra, is erroneous, but the petition for certiorari does not question the soundness of such holding nor ask that it be overruled or qualified. We, therefore, submit the petition should be denied because the decision below is clearly correct.

Respectfully submitted,

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